No. 11843.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

PACIFIC ELECTRIC RAILWAY COMPANY, a corporation,

Appellee.

PACIFIC ELECTRIC RAILWAY COMPANY, a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

OPENING BRIEF FOR PACIFIC ELECTRIC RAILWAY COMPANY.

FILED

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OPENING BRIEF FOR PACIFIC ELECTRIC RAILWAY COMPANY.

Opinion Below.

The decision of the District Court is reported in 71 Fed. Supp. 987, dated May 19, 1947 and is contained in the record at pages 41-46. The findings of fact and conclusions of law and judgment are at pages 47-51 of the record.

Jurisdiction.

This action was brought under the Tucker Act (March 3, 1911), 36 Stat. 1091, 1093, c. 231, as amended, 28 U. S. C. A. §41 (20), 7 F. C. A. Title 28, §41 (20), [R. 2.]

Statutes Involved.

The case involves the construction of Section 321(a) of Part II, Title III of the Transportation Act of 1940, and the complete provisions of this section and of Section 321(b) are set forth in the appendix.

Statement of Points to Be Urged.

The Statement of points on which Pacific Electric Railway Company intends to rely as appellant is set forth in the record at page 133. Specifically, Pacific Electric Railway Company urges that the Conclusions of Law and Judgment are erroneous in determining in paragraphs I and IV that "all the shipments involved in this action were shipments of 'military or naval property moving for military or naval and not for civil use' within the meaning of Section 321(a) of the Transportation Act of 1940," and that "defendant was entitled to land grant rates on all the shipments involved in this action other than the shipments" as to which the trial court found were not the property of the United States at the time of shipment.

Statement of the Case.

The issues of this case and most of the facts are contained in the Stipulation of Facts. [R. 14-39.] The issues agreed upon in the Stipulation of Facts superseded the issues as raised in the Petition and Answer. [R. 60.]

This case involves the question of the correct freight charges applicable to shipments transported by plaintiff and connecting carriers for the defendant, acting through the United States Maritime Commission. Plaintiff claims full commercial rates are due on these shipments, and the suit is for the difference between the amount paid and the full commercial rate. The Government claims that land grant rates are applicable, and that plaintiff has been fully paid. The payment which has been made is admittedly the land grant rate. The amount claimed by plaintiff is admittedly the full commercial rate. The determination of the correct freight charges is governed by the construction to be given the following portion of Section 321(a) of Part II, Title III of the Transportation Act of 1940 (49 U. S. C. A., Sec. 65):

> "Notwithstanding any provision of law, but subject to the provisions of sections 1(7) and 22 of The Interstate Commerce Act, as amended, *the full applicable commercial rates, fares, or charges, shall be paid for transportation by any common carrier subject to such Act of any* persons or *property for the United States, or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use* or to the transportation of members of the military or

naval forces of the United States (or of property of such members) when such members are traveling on official duty; . . ."

The above provision was eliminated from Section 321(a) by the Act of December 12, 1945, 59 Stat. 606, c. 573, 49 U. S. C. A. Section 65a, the elimination being effective October 1, 1946. All of the shipments involved in this case were prior to October 1, 1946, the dates of delivery being between December 29, 1941 and June 23, 1943. There is, therefore, no question that the above quoted portion of Section 321(a) is applicable to all the shipments in this case. There is also no question that the requirements of Section 321(b) have been met by all carriers involved. [R. 22-23.]

Plaintiff, as the last in a series of connecting common carriers by rail, transported certain materials for use in the construction of Liberty ships built by California Shipbuilding Corporation for the United States Maritime Commission. [R. 14-15.] These Liberty ships were being constructed by California Shipbuilding Corporation under contracts with the Maritime Commission entered into pursuant to the following Acts [R. 15-19]:

1. Act of February 6, 1941 (Public Law No. 5, 77th Congress, 55 Stat. 5);
2. Act of March 27, 1941 (Public Law No. 23, 77th Congress, 55 Stat. 53), "Defense Aid Supplemental Appropriation Act";
3. Act of August 25, 1941 (Public Law No. 247, 77th Congress, 55 Stat. 669 at 681), "First Supplemental National Defense Appropriation Act, 1942";
4. Act of June 27, 1942 (Public Law No. 630, 77th Congress, 56 Stat. 392 at 418), "Independent Offices Appropriation Act, 1943".

The following is a statement showing the materials shipped, the carrier's bill number, the bill of lading number, the purchase contract number, and the amount in dispute:

Materials Shipped	Carrier's Bill No.	Bill of Lading Number	Purchase Contract Number	Amount in Dispute
Condensers (Machinery)	F-18436-3	MC-218872	CD-MC-42-110 (MCc-3173)	$ 375.40
Power boilers & fixtures	F-10611-1	MC-21162	MCc-(ESP)-1008	600.51
Steel Plates	F-10503-12	MC-88579	MCc-(ESP)-1520	321.02*
Steel angles, steel channels & steel plates	F-10610-1	MC-22992	MCc-(ESP)-1145	201.89*
		MC-19113	MCc-(ESP)-1016 MCc-(ESP)-1083	609.19
Steel plates & steel sheets	F-10540-1	MC-28270	MCc-(ESP)-1837	420.02*
		MC-34759	MCc-(ESP)-2690	200.73*
Steel plates	F-21750-7	MC-411214 MC-411234 MC-411239 MC-411273	PD-MC-43-10664 (MCc-7300)	5,312.62
Engine parts	F-10535-1	MC-16624 MC-16623 MC-16626 MC-16627 MC-16629	MCc-(ESP)-1028	496.69
Engine parts	F-11274-4	MC-37295 MC-37321 MC-37322 MC-37325 MC-37326	MCc-(ESP)-1020	405.75
	Total Amount in Dispute			$8,943.82

*Indicates shipments as to which trial court held for plaintiff on the ground that they were not the property of the United States at the time of shipment.

Questions Presented.

The question presented is whether plaintiff is entitled to full commercial rates on the shipments involved, or whether land grant rates apply.

In order to determine whether land grant rates or full commercial rates are applicable to these shipments in question under the provisions of Section 321(a), there are three questions:

1. Were the shipments military or naval property?
2. Were the shipments moving for military or naval and not for civil use?
3. Were the shipments the property of the United States?

The trial court determined that all of the shipments were military or naval property moving for military or naval and not for civil use. It is from this determination that Pacific Electric Railway Company is appealing.

The trial court found as to certain of the shipments that they were not property of the United States at the time of shipment, and therefore, not entitled to land grant rates. It is from this determination that the United States is appealing.

Summary of Argument.

I. Construction of Section 321(a) by the United States Supreme Court.

II. Materials in This Case Were Not Military or Naval Property Moving for Military or Naval and Not for Civil Use Within the Meaning of Section 321(a).

(a) Use for which materials shipped in this case were intended.

(b) The Maritime Commission under Merchant Marine Act of 1936 and the appropriations under which the ships in question were constructed.

(c) What shipments by the Maritime Commission are "military and naval" and what shipments are civil?

(d) Time when character of shipment is to be determined.

(e) Summary of reasons why materials in this case were not military or naval property moving for military or naval and not for civil use within the meaning of Section 321(a).

III. The Trial Court Properly Held for Pacific Electric Railway Company as to Certain of the Shipments as Title Was Not in the United States at the Time of Shipment.

ARGUMENT.

I.

Construction of Section 321(a) by United States Supreme Court.

Two decisions of the United States Supreme Court have considered the construction to be given to the portion of Section 321(a) in question, to-wit, *United States v. Powell,* 91 L. Ed. 868, 330 U. S. 238, 67 S. Ct. 742, March 3, 1947, and *Northern Pacific Ry. Co. v. United States,* 91 L. Ed. 876, 330 U. S. 248, 67 S. Ct. 747, March 3, 1947. A copy of these decisions is set forth in the Appendix. In the case of *United States v. Powell,* the Supreme Court held shipments of fertilizer to Great Britain under the Lend-Lease Act were not entitled to land grant rates, and the Court stated in regard to the meaning of the phrase "military or naval property of the United States moving for military or naval and not for civil use" within the meaning of Section 321(a) of the Transportation Act, 91 L. Ed. 873:

> ". . . But it is apparent from the face of the statute that there are important limitations on the type of property which must be carried at less than the applicable commercial rates. In the first place, it is not the transportation of 'all' property of the United States that is excepted but only the transportation of 'military or naval' property of the United States. In the second place, the excepted property must be 'moving for military or naval and not for civil use.' Thus the scope of the clause is restricted both by the nature of the property shipped and by the use to which it will be put at the end of the transportation."

Further in the opinion, pages 874 and 875, the Court stated:

> ". . . In September, 1940, when the Transportation Act was passed, Congress and the nation were visibly aware of the possibilities of war. Appropriations for the army and navy were being increased and the scope of their operations widened, alien registration was required, training of civilians for military service was authorized, development of stock piles of strategic and critical materials was encouraged—to mention only a few of the measures being passed in the interests of national defense. See 50 Yale L. J. 250. Moreover, the realities of total war were by then plain to all. Europe had fallen; militarism was rampant. Yet in spite of our acute awareness of the nature of total war, in spite of the many measures being enacted and the many steps being taken by the Congress and the Chief Executive to prepare our national defense, §321(a) of the Transportation Act was couched in different terms. In other parts of that Act, as in many other Congressional enactments passed during the period, the exigencies of national defense constituted the standard to govern administrative action. But the standard written into §321(a) did not reflect the necessities of national defense or the demands which total war makes on an economy. It used more conventional language—'military or naval' use as contrasted to 'civil' use. That obviously is not conclusive on the problem of interpretation which these cases present. But in light of the environment in which §321(a) was written we are reluctant to conclude that Congress meant 'all property of the United States transported for the national defense' when it used more restricted language.

"In the second place, the language of §321(a) emphasizes a distinction which would be largely obliterated if the requirements of national defense, accentuated by a total war being waged in other parts of the world, were read into it. Section 321(a) uses 'military or naval' use in contrast to 'civil' use. Yet if these fertilizer shipments are not for 'civil' use, we would find it difficult to hold that like shipments by the Government to farmers in this country during the course of the war were for 'civil' use. For in total war food supplies of allies are pooled; and the importance of maintaining full agricultural production in this country if the war effort was to be successful, cannot be gainsaid. When the resources of a nation are mobilized for war, most of what it does is for a military end—whether it be rationing, or increased industrial or agricultural production, price control, or the host of other familiar activities. But in common parlance, such activities are civil, not military. It seems to us that Congress marked that distinction when it wrote §321(a). If that is not the distinction, then 'for military or naval and not for civil use' would have to be read 'for military or naval use or for civil use which serves the national defense.' So to construe §321(a) would, it seems to us, largely or substantially wipe out the line which Congress drew and, in time of war, would blend 'civil' and 'military' when Congress undertook to separate them. Yet §321(a) was designed as permanent legislation, not as a temporary measure to meet the exigencies of war. It was to supply the standard by which rates for government shipments were to be determined at all times—in peace as well as in war. Only if the distinction between 'military' and 'civil' which common parlance marks is preserved, will the statute have a constant meaning whether shipments are made in

days of peace, at times when there is hurried activity for defense, or during a state of war.

"In the third place, the exception in §321(a) extends not only to the transportation of specified property for specified uses. It extends as well to 'the transportation of members of the military or naval forces of the United States (or of property of such members) when such members are traveling on official duty . . .' That clause plainly does not include the multitude of civilians employed by the Government during the war and exclusively engaged in furthering the war effort, whether they be lend-lease officials or others. Thus, the entire except clause contained in §321(a) will receive a more harmonious construction if the scope of 'military or naval' is less broadly construed, so as to be more consonant with the restrictive sense in which it is obviously used in the personnel portion of the clause."

In the case of *Northern Pacific Railway Company v. United States,* the Supreme Court held that copper cable for use in the installation of degaussing equipment on a cargo vessel, lumber for construction of munitions plant, lumber for construction of Marine Corps pontons, bowling alleys for Dutch Harbor, and liquid paving asphalt for Cold Bay, Alaska, airport, were materials entitled to land grant rates. The Court in its opinion, 91 L. Ed. 880 and 881 stated as follows:

". . . And as we have said, the property in each case was at the time of shipment property of the United States. The question remains whether within the meaning of §321(a) it was 'military or naval' property and, if so, whether it was 'moving for military or naval' use.

"There is a suggestion that since the shipment of asphalt was to a civilian agency, the Civil Aeronautics Authority, it was not 'military or naval' property. The theory is that 'military or naval' property means only property shipped by or under control of the Army or Navy.

"We see no merit in that suggestion. Section 321(a) makes no reference to specific agencies or departments of government. The fact that the War or Navy Department does the procurement might, of course, carry special weight or be decisive in close cases. But it is well known that procurement of military supplies or war material is often handled by agencies other than the War and Navy Departments. Procurement of cargo and transport vessels by the Maritime Commission is an outstanding example. See Merchant Marine Act of [June 29] 1936, c. 858, §902, 49 Stat. 1985, 2015, 2016, as amended, 46 USCA §1242, 10 F. C. A. title 46, §1242. And shortly before the Transportation Act of 1940 was enacted, Congress by the Act of June 25, 1940, 54 Stat. 572-574, c. 427, authorized the Reconstruction Finance Corporation to create subsidiary corporations to purchase and produce equipment, supplies, and machinery for the manufacture of arms, ammunition, and implements of war. And later that Act was amended to enable those corporations to purchase or produce any supply or article necessary for the national defense or war effort. Act of June 10, 1941, 55 Stat. 248, 249, c. 190. As we have held in United States v. Powell (U. S.) *supra,* not every purchase which furthers the national defense is for 'military or naval' use within the meaning of §321(a). But property may fall within that category though it is procured by departments other than War or Navy.

"It is also suggested that the property covered by the exception in §321(a) is confined to property for ultimate use directly by the armed forces. Under that view materials shipped for the construction of vessels for the Maritime Commission and used to service troops at home or abroad would not be 'military or naval' property. We likewise reject that argument. Civilian agencies may service the armed forces or act as adjuncts to them. The Maritime Commission is a good example. An army and navy on foreign shores or in foreign waters cannot live and fight without a supply fleet in their support. The agency, whether civil or military, which performs that function is serving the armed forces. The property which it employs in that service is military or naval property, serving a military or naval function."

Later, at page 881, the Court stated:

"Military or naval property may move for civil use, as where Army or Navy surplus supplies are shipped for sale to the public. But in general the use to which the property is to be put is the controlling test of its military or naval character. Pencils as well as rifles may be military property. Indeed, the nature of modern war, its multifarious aspects, the requirements of the men and women who constitute the armed forces and their adjuncts, give military or naval property such a broad sweep as to include almost any type of property. More than articles actually used by military or naval personnel in combat are included. Military or naval use includes all property consumed by the armed forces or by their adjuncts, all property which they use to further their projects, all property which serves their many needs or wants in training or preparation for war, in combat, in maintaining them at home

or abroad, in their occupation after victory is won. It is the relation of the shipment to the military or naval effort that is controlling under §321(a) . . ."

At page 883, the Court stated:

". . . We have more in §321(a) than a declaration that 'military or naval' property is entitled to land-grant rates. Congress went further and drew the line between property moving for 'military or naval' use and property moving for 'civil' use. As we have said, the controlling test is the use to which the property is dedicated or devoted. The fact that Congress did not define what was a 'military or naval' use as distinguished from a 'civil' use is unimportant. The classification made by Congress under this Act, unlike that made under the acts on which petitioner relies, was all inclusive, not partial. What is military or naval is contrasted to what is civil. The normal connotation of one serves to delimit or expand the other. It is in that context that 'military or naval' must be construed."

The Court reached the following conclusions as to materials involved in this case, at page 882:

"Measured by that test, there can be no doubt that the five types of property involved in the present litigation were 'military or naval' property of the United States 'moving for military or naval and not for civil use' within the meaning of §321(a). The lumber for the pontons, the asphalt for the airfield, the lumber for the ammunition plant were used in Army or Navy projects directly related to combat preparation or to actual combat. Copper cable for the cargo vessel, though farther removed from that category, was well within the definition of 'military or naval' property. It, too, was a defensive weapon.

> Beyond that it was purchased by the Navy Department and consigned to one of its officers. It was supplied pursuant to Navy specifications; and the ship on which it was installed was being prepared for possible ultimate use by the Navy. The bowling alleys were also well within the statutory classification. The needs of the armed forces plainly include recreational facilities. The morale and physical condition of combat forces are as important to the successful prosecution of a war as their equipment. The fact that the bowling alleys were planned for initial use of civilian workers makes no difference. It is the nature of the work being done, not the status of the person handling the materials, that is decisive. Supplies to maintain civilians repairing Army or Navy planes is a case in point. The dominant purpose of the project in this case was the same whether civilians or military or navy personnel did the actual work."

It should be noted that in neither of these cases are there any shipments for the Maritime Commission. The shipment of copper cable was for use in the installation of degaussing equipment on a cargo vessel. It should be noted that this copper cable was purchased by the Navy Department, consigned to one of its officers and supplied pursuant to Navy specifications.

It is true that the Northern Pacific decision contains dicta in regard to shipments of materials for construction of ships for the Maritime Commission. The decision stated that to be "military or naval" did not require that the materials be procured by the War or Navy Departments, but they could be procured by the Maritime Commission for cargo and transport vessels. The decision also stated property covered by the exception in Section

321(a) was not confined to property for ultimate use directly by the armed forces but would include materials shipped for the construction of vessels for the Maritime Commission to be used to service troops at home or abroad.

Not even the dicta of the Northern Pacific decision states that all property of the Maritime Commission is "military or naval property moving for military or naval and not for civil use." It is therefore, necessary to determine the intended use of the shipments involved in this action.

II.

Materials in This Case Were Not Military or Naval Property Moving for Military or Naval and Not for Civil Use Within the Meaning of Section 321(a).

(a) Use for Which Materials Shipped in This Case Were Intended.

The materials forming the basis of this action were purchased for use in the construction of ships, authorized and the funds for which were appropriated by Public Laws 5, 23, 247 and 630, 77th Congress. In each case these laws provided that the ships were to be of such type, size and speed as the Commission may determine. Public Law 5 referred to "ocean-going cargo vessels . . . useful in time of emergency for carrying on the commerce of the United States, and to be capable of the most rapid construction." Public Law 23 made appropriations to enable the President, through such departments or agencies of the Government as he may designate, to carry out the provisions of the Lend-Lease Act. Among these appropriations was an appropriation for "vessels, ships,

boats and other watercraft and equipage, supplies, materials, spare parts and accessories." Pursuant to Public Law 23, the President authorized the Maritime Commission to enter into commitments for the construction of vessels similar to those authorized by Public Law 5. Public Laws 247 referred to "merchant vessels . . . useful for carrying on the commerce of the United States and suitable for conversion into naval or military auxiliaries." Public Law 630 appropriated funds to increase the construction fund established by the Merchant Marine Act of 1936, and provided that this construction fund should be available for carrying out the activities and functions which the Commission is authorized to perform under Public Law 247.

As to each of these appropriations, the Maritime Commission determined to construct Liberty ships. The reasons for the construction of these ships, and some of their characteristics, are given in the following excerpts from Congressional Committee hearings and reports on the bills enacted into Public Laws 5 and 247: House of Representatives Report No. 10, January 22, 1941, on House Joint Resolution 77, which became Public Law 5, on pages 3-4, stated as follows:

> "The American tonnage in normal times has not been adequate to carry the proportion of our foreign trade that should be transported in vessels of our flag. During the calendar year 1939, approximately 25 percent of the waterborne foreign commerce of the United States (exclusive of tanker traffic) was carried in our ships and 75 percent in vessels of foreign registry; about 34 percent of the total was carried in vessels of British registry.

"There has been a serious depletion of world tonnage due to the war. According to figures furnished the committee, 1,371 ships of five and one-half million gross tonnage have been lost between September 3, 1939, and January 1, 1941. While new tonnage has been added, the threat of a shortage and its effect on our commerce exists. The destruction of such a large volume of foreign tonnage, the diversion of a substantial volume of foreign tonnage for carrying commerce in world trade to specific national uses under war conditions, the internment of considerable tonnage of nations not directly at war, and the congestion of shipyards with combatant ships, have all had the effect of decreasing the reserve tonnage of the United States.

"Some ships constructed by the Maritime Commission for the American Merchant Marine instead of reaching or remaining in the mercantile traffic have been taken and are being taken as auxiliaries for the Navy and some have been taken for Army requirements. These ships were constructed under the Merchant Marine Act with Government aid and were designed for use in emergency as naval auxiliaries and the wisdom of that policy is finding fruit in having suitable vessels of the type required for the Navy. In addition to vessels taken by the Army and Navy from among those produced under the regular Commission program, other vessels have been acquired for those services and the total number of ships taken by both services is 62. With the demand already heavy for Navy purposes, the development of the two-ocean Navy will place a further burden on ships produced in the future under the Commission's regular program.

"The prevalence of war conditions necessitates much of the merchant tonnage traveling longer routes

than the normal channels of trade follow and the consequence of this procedure is the need for more tonnage for some voyages due to the longer turn-around time of the ships.

"The increased trade with South American countries as the result of the elimination of certain foreign competitors by the war and the diversion of foreign-flag tonnage from the carrying trade to those countries also contribute to our need for emergency tonnage. Our commerce has also increased in other parts of the world where our ships are permitted to ply.

"The defense requirements of the United States, particularly in the importation of strategic and critical materials from various parts of the world have placed a burden on our mercantile shipping that is being very definitely and increasingly felt.

"A number of ships have transferred their registry from American to foreign and a large tonnage, represented principally by ships that were not salable in normal times but now in demand, has been sold and gone to foreign registry.

"All of the factors enumerated have operated to produce a situation in the American merchant marine which Admiral Land has advised the committee will result in a serious shortage of tonnage in the near future unless a program of the character recommended in the joint resolution is adopted.

"A factor for consideration, though not contributing to the immediate necessity, is the condition of the ships in the coastal trade. The average age of these vessels is 20 to 25 years and they will need to be replaced in 4 or 5 years by ships suitable for that service. The utility of some of the emergency cargo vessels in this trade after the emergency has passed has possibilities.

"The construction program consists of a total of 200 emergency type steel cargo ships of 7,500 gross tons each of box shaped uniform design, speed of 10 or 11 knots per hour, equipped with 2,500-horsepower reciprocating engines, steam auxiliaries, and oil-burning water-tube boilers. The design of the ships has been made as simple as possible by eliminating much electrical equipment and reducing the number of castings, forgings, etc., to a minimum in order to produce, quickly and without interference with the naval construction program and the regular merchant-ship program, cargo vessels that are essential in the emergency. The total gross tonnage will be 1,500,000."

The passage of Public Law 5 was primarily the result of a communication from Franklin D. Roosevelt, President of the United States, dated January 16, 1941, addressed to Congress, and which is referred to as House Document No. 51. The first few sentences of this communication state as follows:

"I am convinced that the national interest demands that immediate steps be taken upon an emergency basis to provide against the effect upon the United States of a possible world shortage of cargo vessels.

"Therefore, I feel that there should be undertaken with the least possible delay the construction of not less than 200 steel cargo vessels, suitable for use in the present emergency and of such type and design as will permit of their most rapid construction.

"Such a program of emergency shipbuilding should be entirely distinct from the long-range construction program with which the United States Maritime Commission is proceeding under the 1936 Merchant

Marine Act, and interference with that program, *as well as interference with the naval construction program, must be avoided.*"

It will be noted that in the above communication, the President considers the naval construction program to be something entirely different from the construction program under the supervision of the Maritime Commission.

As further indicating the expectation that these ships would be devoted primarily to purposes of commerce rather than of war, there have been noted the views expressed in the following excerpts from the hearings before the subcommittee of the Committee on Appropriations, House of Representatives, in connection with House Joint Resolution 77, which became Public Law 5:

"Page 4:

"Admiral Land. This particular appropriation covers 200 ships.

"Mr. Johnson of West Virginia. What are you going to do with them?

"Admiral Land. We are going to operate them.

"Mr. Ludlow. Would they be held in reserve for any particular purpose, Admiral?

"Admiral Land. I would say they would be held in reserve for the transportation of American commerce. Where they would be operated it would be useless for me to attempt to predict, because these ships will not be available for some time. The first ship, we estimate, will be completed in 11 months after the date of the contract, and the total program will be completed in 24 months after the date of the contract.

"Page 5:

"Mr. Cannon. What comparison is there in need and circumstances and purpose, as between these ships and the wooden ships built during the World War?

"Admiral Land. I do not think there is any proper basis of comparison between these and the wooden ships, because these are so far superior to the wooden ships, in carrying capacity and other ways.

"Mr. Cannon. Are they being asked for the same purpose?

"Admiral Land. I would say, generically they are, with this modification. The wooden ships and the concrete ships in the last war were built for what is generically known as the bridge of ships between here and Europe. There is no such purpose in this, as far as my knowledge goes. There were some 2,300 vessels built for this bridge of ships, and here we are talking about 200 ships. There is no comparison.

"Mr. Cannon. They are not being requisitioned for the same purpose?

"Admiral Land. No; as far as my knowledge goes they are for American Commerce.

"Page 11:

"Mr. Ludlow. Will they be used exclusively for American commerce, or will they be used in cooperation with Great Britain?

"Admiral Land. They would be more for the transportation of American commerce. As I have indicated, there is a probable use for them in the intercoastal and domestic trade, in which they would be superior to what we have now. As to what may happen to them after that, I would not want to prophesy."

House of Representatives Report No. 988 of Committee on Appropriations, July 24, 1941, 77th Congress, on the First Supplemental National Defense Appropriation Bill, 1942, which became Public Law 247, stated as the reasons for the need of additional ships, pages 8-9:

> "When the emergency cargo-ship construction program of 200 vessels was presented in January of this year it was believed that the tonnage to be procured thereby, in addition to the tonnage in the regular program of the Commission, would supply the deficiency in merchant ship tonnage that would develop by 1942. The shipping situation, however, both as to our own needs and the needs of the nations whose defense is deemed vital to the defense of the United States, has become serious much sooner than could have been anticipated at the time the emergency program was originated. The Lend-Lease Act of March 11, 1941, has resulted in a very considerable need for increased tonnage in the merchant marine.
>
> "Some of the factors entering into a determination of the need for additional tonnage are as follows:
>
> "(1) The withdrawal or imminent withdrawal of 100 ships, totaling approximately 1,000,000 tons, from the domestic trade for the Red Sea service for Great Britain.
>
> "(2) The withdrawal of Norwegian, Dutch, and other allied ships from the Western Hemisphere for British use in the North Atlantic leaving a deficiency in our own essential services to the Orient and South America.
>
> "(3) The furnishing of approximately 2,300,000 tons of shipping for delivery of goods transferred under the lend-lease program for North Atlantic service to carry war materials to Great Britain. Such vessels operate under foreign flag but come from the

American merchant fleet and reduce the tonnage available for our own imports by the same amount.

"(4) The tanker shuttle service operating under lend-lease has taken approximately 600,000 tons from the domestic tanker fleet.

"(5) Aid to China is estimated to require 450,000 tons of shipping in the fiscal year 1942.

"(6) Since the outbreak of the European War, 111 vessels, aggregating 1,117,977 tons, have been acquired by, or are now under construction for, the Army and Navy and further requirements are to be expected as military needs increase.

"(7) The Army estimates it will require the shipment of 1,654,000 more tons of cargo to United States bases outside continental United States than can be handled by the Army transport service.

"(8) Reliable estimates place the losses of British, Allied, and neutral shipping sunk prior to July 9, 1941, at 9,500,000 dead-weight tons.

"(9) Estimates prepared by O. P. M. and O. P. A. C. S. indicate that American vessels should be made available to import approximately 34,000,000 tons of defense and civilian commodities during the present fiscal year. This represents an increase in imports of 45 percent over 1939 when only one-fourth of our imports were carried in American-flag vessels. Practically all of this 34,000,000 tons, if imported, must be brought in American ships. This burden thrown on the American fleet for defense and civilian requirements is roughly five times as much as was carried in American ships in 1939."

In regard to the proposed method of operation of these ships, the following portion of the hearings, August 9, 1941, before the Subcommittee of the Committee on Ap-

propriations, United States Senate on First Supplemental National Defense Appropriation Bill for 1942, which became Public Law 247, gives some information, printed report of hearings, page 241:

"Admiral Land (Chairman, United States Maritime Commission). As far as we can see, we hope not to operate ships, for two reasons: One is that we have the directive from Congress that the American merchant marine shall be privately operated, if at all practicable; and secondly, we haven't the proper operating personnel and could not get it without making a tremendous expansion and encroaching upon private business. So that our policy is to charter to operators, giving preference to operators who have operated under the American Flag and who have made direct and indirect contributions, and who have cooperated in the matter of ships, personnel, and everything pertaining to shipping operations in the all-out national-defense picture.

"In other words, the company which has gone in with us and built ships—and then the Army comes along and takes the ships—we feel in justice to such a company that it should have preference or preferential treatment in the chartering of such ships as we are able to obtain by law.

"Senator Adams. When you use the term 'charter,' you mean a transfer of ownership, do you?

"Admiral Land. No, sir. It is just like renting a house.

"Senator Adams. The reason I asked you is that I understood you to say you did not have the ownership of any ships.

"Admiral Land. When I say we don't own any ships, I should probably correct that by saying that these foreign-flag ships—German and others, which

> have been sabotaged—we are seizing those ships and therefore they are under American ownership and the title is in the Maritime Commission.
>
> "Senator Adams. I am thinking just in terms of the ships you are building.
>
> "Admiral Land. No, no. We own them only as we build them, and sell them, most of the time, during course of construction to private operators."

Later, on page 249 the following is reported:

> "Senator Thomas. Do you have prospective buyers for all the ships building?
>
> "Admiral Land: In so far as the standard program, yes, sir; in so far as the emergency program, no sir.
>
> "Senator Thomas. What happens when you build a ship and there is no buyer for it?
>
> "Admiral Land. We charter it or operate it, if necessary.
>
> "Senator Thomas. How many ships are you operating now?
>
> "Admiral Land. None.
>
> "Senator Thomas. So far, then, you have been lucky or successful in disposing of your merchandise?
>
> "Admiral Land. That is a fair way of stating it, Senator."

Most of the Liberty ships were operated as merchant vessels under the direction and control of the War Shipping Administration through agency agreements with private operators. [R. 20.] There is no showing that any of the ships constructed with the materials in question were used other than as merchant vessels.

(b) The Maritime Commission Under Merchant Marine Act of 1936 and the Appropriations Under Which the Ships in Question Were Constructed.

The United States Maritime Commission was created by the Merchant Marine Act, 1936 (see 46 U. S. C. A., Secs. 1101, *et seq.*).

The declaration of policy of the Merchant Marine Act, 1936 is contained in Section 1101 of 46 U. S. C. A., which is as follows:

> "It is necessary for the National defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service on all routes essential for maintaining the flow of such domestic and foreign water-borne commerce at all times; (b) capable of serving as a naval and military auxiliary in time of war or national emergency; (c) owned and operated under the United States flag by citizens of the United States, in so far as may be practicable, and (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel. It is hereby declared to be the policy of the United States to foster the development and encourage the maintenance of such merchant marine. June 29, 1936, c. 858, Title I, §101, 49 Stat. 1985."

This policy is further emphasized by the provisions of Section 1120 of 46 U. S. C. A., which is as follows:

> "It shall be the duty of the Commission to make a survey of the American merchant marine, as it now

exists, to determine what additions and replacements are required to carry forward the national policy declared in Section 1101 of this title, and the Commission is directed to study, perfect, and adopt a long-range program for replacements and additions to the Amercan merchant marine, so that as soon as practicable the following objectives may be accomplished:

"First, the creation of an adequate and well-balanced merchant fleet, including vessels of all types, to provide shipping service on all routes essential for maintaining the flow of the foreign commerce of the United States, the vessels in such fleet to be so designed as to be readily and quickly convertible into transport and supply vessels in a time of national emergency. In planning the development of such a fleet the Commission is directed to cooperate closely with the Navy Department as to national defense needs and the possible speedy adaptation of the merchant fleet to national-defense requirements.

"Second, the ownership and the operation of such a merchant fleet by citizens of the United States in so far as may be practicable.

"Third, the planning of vessels designed to afford the best and most complete protection for passengers and crew against fire and all marine perils. June 29, 1936, c. 858, Tile II, Sec. 210, 49 Stat. 1989."

By Section 1116, a construction fund is created which shall be "maintained as a revolving fund . . . and shall be available for expenditure by the Commission in carrying out the provisions of this chapter."

The fund established by Section 1116 of 46 U. S. C. A. is referred to as "69X0200 Construction Fund, U. S. Maritime Commission Act of June 29, 1936 Revolving Fund." [R. 22.]

By the Act of February 6, 1941, Public Law 5, there was created the "Emergency Ship Construction Fund, United States Maritime Commission." This fund was created for the purpose of providing as rapidly as possible cargo ships essential to the commerce and defense of the United States, which fund was to be available for the payment of contract authorizations for the construction in the United States of ocean-going cargo vessels of such type, size and speed as the Commission may determine to be useful in time of emergency for carrying on the commerce of the United States and to be capable of the most rapid construction, and for the purpose of carrying out the provisions of the Merchant Marine Act of 1936 as amended. This fund is known as "69X0201 Emergency Ship Construction Fund, U. S. M. C." [R. 22.]

The third fund from which the construction of the ships in question was paid for was the fund established under the Act of March 27, 1941, Public Law 23, which is known as the "Defense Aid Supplemental Appropriation Act, 1941." This act was passed for the purpose of making appropriations to carry out the Lend-Lease Act (Act of March 11, 1941). The Lend-Lease Act was passed to provide aid to the government of any country whose defense the President deemed vital to the defense of the United States. By Public Law 23, an appropriation was made among other things, for "vessels, ships, boats and other watercraft and equipage, supplies, materials, spare parts and accessories." The fund authorized under this appropriation is known as "69X-111/30023 Defense Aid, Vessels and Watercraft (Allot. to U. S. Mar. Com.) 1941-1943." [R. 22.]

Public Law 247 made appropriations to increase the construction fund established by the Merchant Marine Act, 1936 (46 U. S. C. A. 1116) and provided that "there may be transferred from this appropriation to the 'Emergency Ship Construction Fund, United States Maritime Commission,' created by said Act of February 6, 1941 (Public Law 5) such amounts as the Commission may deem necessary for the completion of the program authorized by said Act."

Public Law 630 appropriated funds to increase the construction fund established by the Merchant Marine Act, 1936, and provided that this construction fund should be available for carrying out the activities and functions which the Commission is authorized to perform under Public Law 247.

In other words, all the appropriations for the ships in question were made either to carry out the objects and purposes of the Merchant Marine Act of 1936, or Public Law 5, or of the Lend-Lease Act. It appears that of the disputed freight charges, $5,688.02 covered by freight bills No. F-18436-3 and No. F-21750-7, was chargeable to the Maritime Commission Revolving Fund created by the Act of June 29, 1936, Section 1116 of 46 U. S. C. A. Of the remaining disputed freight charges, $1.836.28 was payable from the Emergency Ship Construction Fund created by the Act of February 6, 1941, Public Law 5 of the 77th Congress, and $1,419.52 was payable from the Defense Aid, Vessels and Watercraft Fund created by the Act of March 27, 1941, Public Law 23 of the 77th Congress, which was to carry out the purposes of the Lend-Lease Act.

The Stipulation of Facts provides that the materials shipped were purchased with funds from the same appropriations as the appropriations from which the freight charges were paid. [R. 21.] Therefore, the shipments covered by freight bills No. F-18436-3 and F-21750-7 were purchased from the Maritime Commission Revolving Fund, and the remaining shipments were purchased from the other two funds mentioned.

(c) What Shipments by the Maritime Commission Are "Military or Naval" and What Shipments Are Civil?

The Supreme Court has stated in the decision in the *Northern Pacific* case that the activities of the Maritime Commission can be "military or naval" within the meaning of Section 321(a). The activities of the Maritime Commission more frequently are civil activities. The question is under which of these classifications the shipments of materials in this case should be classed.

At the start, the position taken by the Maritime Commission should be mentioned. It appears that the first official action taken by the Maritime Commission claiming that shipments for the construction of its vessels were "military or naval" was the resolution of December 4, 1942. [R. 72-75.] By this resolution, it was "determined" that as of December 8, 1941 all shipments for the construction of vessels by the Maritime Commission "upon passage of title to the Government after said date of December 8, 1941, military or naval property of the United States and upon shipment moved for military or naval and not for civil use." [R. 75.] Subsequently, by resolution of July 2, 1946, the Maritime Commission "determined" that property of the Maritime Commission when shipped

after September 1, 1945 "should not be regarded as military or naval property of the United States moving for military use." [R. 76-77.]

It should be noted that at least one case has drawn the dividing line at a different place than drawn by the Maritime Commission.

In the case of *St. Johns River Shipbuilding Co. v. Adams,* 164 F. (2d) 1012 (December 12, 1947, C. C. A. 5th Cir.), the Court held that employees engaged in building Liberty ships for the Maritime Commission were engaged in production of goods for commence under the Fair Labor Standards Act, but that employees engaged in construction of tankers were not engaged, the Court stated, pages 1014-1015:

> "These employees were found to be employed in building ships and doing work essential to that end. Ships are by the definition of the statute included among 'goods.' Sect. 3(i), 29 U. S. C. A., §203(i). Ships which are to be used as vehicles of interstate and foreign transportation are fairly 'goods for commerce,' for the statute, Sec. 3(b), and the Constitution include transportation as commerce. There would be no difficulty save for the fact of war, declared in December, 1941. Yet war does not stop all commerce nor suspend the laws regulating commerce. Goods, including ships, may still be produced for commerce, and we think the Liberty Ships were so produced. The Maritime Commission, normally a peace time agency, made the contracts for these, the contracts reciting as their authority Act No. 247, Aug. 25, 1941, of the 77th Congress, 55 Stat. 669, 681, authorizing it to contract for 'merchant vessels of such type, size, and speed as [it] may determine to be useful for carrying on the commerce of the

United States and suitable for conversion into naval or military auxiliaries.' The contracts state that the vessels ordered are such vessels. The evidence shows no different purpose in producing them. The Interpretive Bulletin No. 5 of the Wage and Hour Division of the Department of Labor issued in December 1938, revised November, 1939, state: 'Employees are engaged in the production of goods for commerce where the employer intends or hopes or has reason to believe that the goods or any unsegregated portion of them will move in interstate commerce. * * * The facts at the time the goods are being produced determine whether an employee is engaged in the production of goods for commerce, and not any subsequent act of his employer, or some third party.' Thus the agreed purpose of these ships was primarily commerce, with only a possibility of utilizing them later for war. As the intentions of the owner and builder stood at the time of construction they appear to have been ships produced for commerce.

"The tanker contract is different. The Maritime Commission there recites as its Congressional authority Act No. 70 of the 78th Congress, approved June 14, 1943, 57 Stat. 151, and Presidential action directing the construction of vessels of the type described in the contract. The defense of the United States is the theme of this Act, and of that which it supplements, Act March 11, 1941, 55 Stat. 31, 22 U. S. C. A., §411 *et seq.*; and commerce is not mentioned.

The evidence is that these tankers were of relatively small size, intended to be used in the fighting in the Pacific in hopping from island to island, to carry fuel from the naval bases to the naval vessels and the soldiers at the fighting front. They were not fitted out and equipped as commercial vessels would have to be to obtain a certificate from the Coast Guard, having 45 defects, including want of proper quarters for crews, and equipment for safety, so that only crews from the navy could operate them under a special permit. They were turned over directly to the navy at the Company's dock. They became 'expendibles' at the battle front. They were goods produced for war, not for commerce. War is not commerce. There can be commerce in war equipment, but when the government itself in the midst of war has produced for immediate use in war at its own expense and in its own shipyard special type vessels as auxiliaries for its navy and to be manned by navy crews, commerce is not involved at all. The Company and its employees knew it was not. The war power of the federal government is its supreme power. When it is in action it is transcendent. This work was not the time and place to bicker about overtime. The men who manned these boats got no overtime. They staked and often lost their lives.

"There is evidence that these tankers can be altered for business use. But it is also testified that not one has found a purchaser since the fighting ceased. It remains true that at the time they were produced

> they were for war and not commerce. What may possibly be done with them in the future is irrelevant. Work done on these tankers is not under this Act."

It is to be noted that the ships other than tankers being constructed by the employees referred to in the above case were constructed under Act No. 247 of August 25, 1941, 77th Congress, which is one of the acts under which the vessels in this case were being constructed.

A somewhat different method of determination of this question has been given by the Comptroller General in an opinion dated August 15, 1941 which is reported in 21 Comp. Gen. Op. 137. This opinion was given in response to a letter from the Maritime Commission requesting the status under the Transportation Act of 1940 of shipments by rail for use in the construction of ships under Public Law 5 of the 77th Congress and the Lend Lease Act. A copy of this opinion is set forth in the Appendix, but the following is the conclusion of the Comptroller General:

> "Therefore, viewing your question in the light of the purposes to be served, so far as is discernible from the legislation under which it appears the vessels are to be constructed, it would seem reasonably clear that while the construction of the vessels for which provision is made in the joint resolution of February 6, 1941, may have resulted from, or may have been necessitated by, the demands arising under the national defense program, the primary purpose of said joint resolution was to provide said ships as a means of preserving or furthering the interests of the com-

merce of the United States and to augment the depleted facilities available for that purpose, replacing vessels withdrawn from said service because of the demands of defense. On the other hand, in the Act to Promote the Defense of the United States and in the Defense Aid Supplemental Appropriation Act, 1941, the emphasis seems to be placed principally upon the rendering of direct aid in resistance to military aggression, though it is conceivable at least, that in some instances articles authorized to be manufactured or produced under said acts might be put, as a matter of defense, to a use not directly connected with military operations. Within the scope of these objectives, it is realized that there is possible a wide variation in the purpose to be served through the use of cargo vessels, ranging from the carrying of munitions and supplies for direct consumption by military forces to the theatre of war, on the one hand, to the transportation of cargoes for domestic consumption, related, as a matter of defense, to military operations only remotely, if at all, on the other. The question as to whether the materials to be procured for the construction of the cargo vessels here concerned under either act are to be directed to the accomplishment of the one or the other of these purposes is a question of fact concerning which information, initially at least, would seem to be an exclusive possession of the administrative agencies involved. The administrative determination, therefore, that the transportation involved in any particular instance embraces materials moving for military or naval and not for civil use

will be given appropriate consideration. Having regard, however, to the purpose or use apparently intended to be served by the legislation concerned, it is believed that with respect to the materials for the construction of the cargo vessels authorized under the joint resolution of February 6, 1941, this office would not be required to object to the payment of transportation charges without deduction for land-grant in the absence of an administrative determination that, under the particular facts that may be involved in any instance, said materials are being transported for military or naval and not for civil use. Likewise, with respect to the materials for the construction of cargo vessels pursuant to the authorizations in the Act to Promote the Defense of the United States and the Defense Aid Supplemental Appropriation Act, 1941, if it be administratively determined that said vessels are to serve the purposes of commerce—as a matter of defense—rather than to participate in the carrying of supplies for military purposes, and that, therefore, the transportation of materials for their construction is regarded as involving materials moving for civil rather than military or naval use, the administrative certification accordingly will be accepted by this office as *prima facie* correct."

(d) Time When Character of Shipments Is to Be Determined.

The rates applicable to a shipment are determined as of the time the shipment is delivered to the carrier. It is, therefore, necessary to examine the situation as it then exists to determine the character of the shipment and the proper rate applicable.

Attached is a statement showing as to all the shipments involved in this action, the freight bill number, the numbers and date of the bill of lading, the number and date of the contract for the purchase of the materials, the date of the consignment, the date of delivery, the number and date of the contract for construction of the vessels for which the materials were to be used, and the act and date of the act under which the appropriations were made for the construction of the ships. This information was assembled from the Stipulation of Facts. [R. 14-39.]

From the attached statement, it appears that most of the acts appropriating funds for the construction of the ships, most of the contracts for the construction of the ships, most of the contracts for the purchase of the materials shipped, and most of the bills of lading are dated prior to December 8, 1941.

Viewing the situation as of the time of shipment, the best way of determining the character of the shipments is by the purpose for which the vessels were to be constructed as shown by the Acts which appropriated the funds for their construction. The particular provisions of these acts, as well as the hearings prior to their enactment, indicate that these vessels were to be used primarily for commerce and not primarily for military or naval purposes.

Freight Bill Number	Bill of Lading Number	Date	Materials Purchase Contract No.	Date	Date of Consign-ment	Date of Delivery	Ship Contract Number	Date	Public Law Number	Date
F-18436-3	MC-218872	9-23-42	CD-MC-42-110 (MC-3173)	12-12-41	1-26-43	3-12-43	MCc-13097	12-24-42	247 630	8-25-41 6-27-42
F-10611-1	MC-21162	9-27-41	MCc-(ESP)-1008	4-14-41	12-16-41 12-17-41	1-20-42	MCc-7785	3-14-41	5	2-6-41
F-10503-12	MC-88579	11-25-41	MCc-(ESP)-1520	8-12-41	12-9-41	12-29-41	MCc-7785 MCc-7786	3-14-41 5-1-41	5 23	2-6-41 3-27-41
F-10610-1	MC-22992 MC-19113	10-3-41 9-19-41	MCc-(ESP)-1145 MCc-(ESP)-1016 MCc-(ESP)-1083	6-20-41 4-16-41 5-17-41	12-29-41 1-6-42	1-23-42 1-23-42	MCc-7785 MCc-7786	3-14-41 5-1-41	5 23	2-6-41 3-27-41
F-10540-1	MC-28270 MC-34759	10-13-41 12-11-41	MCc-(ESP)-1837 MCc-(ESP)-2690	9-8-41 11-27-41	12-21-41 12-22-41	1-6-42 1-8-42	MCc-7785 MCc-7786	3-14-41 5-1-41	5 23	2-6-41 3-27-41
F-21750-7	MC-411214 MC-411234 MC-411239 MC-411273	4-6-43	MCc-(ESP)-730 PD-MC-43-10664	3-4-43	5-16 to 5-31-43	6-14 to 6-23-43	MCc-13097	12-24-42	247 630	8-25-41 6-27-42
F-10535-1	MC-16624 MC-16623 MC-16626 MC-16627 MC-16629	9-3-41	MCc-(ESP)-1028	4-16-41	12-17-41 to 1-1-42	1-3-42 to 1-9-42	MCc-7785	3-14-41	5	2-6-41
F-11274-4	MC-37295 MC-37321 MC-37322 MC-37325 MC-37326	12-18-41	MCc-(ESP)-1020	4-16-41	2-23-42 to 4-6-42	4-18-42 to 4-20-42	MCc-7785	3-14-41	5	2-6-41

(e) Summary of Reasons Why Materials in This Case Were Not Military or Naval Property Moving for Military or Naval and Not for Civil Use Within the Meaning of Section 321(a).

As has been stated, the only information at the time of shipment as to the use of the materials shipped were that they were to be used for the construction of ships constructed under Public Laws 5, 23, 247 and 630 of the 77th Congress. These laws indicated primarily that these ships were being constructed for carrying on the commerce of the United States. Public Law 5 authorized the construction of ocean-going cargo vessels of "such type, size, and speed as the Commission may determine to be useful in time of emergency for carrying on the commerce of the United States and to be capable of the most rapid construction." While Public Law 23 does not provide what kind of ships should be constructed, the President "authorized the Commission to enter into commitments for the construction of emergency type vessels similar to those which the Commission is authorized to construct under 'Public Law 5.'" [R. 16.] Therefore, the vessels constructed under Public Laws Nos. 5 and 23 were constructed for carrying on commerce.

Public Laws Nos. 247 and 630 made appropriations to the construction fund established by the Merchant Marine Act, 1936. The appropriations made by these acts, unless transferred to the Emergency Construction Fund established by Public Law 5, were for use in constructing merchant vessels "useful for carrying on the commerce of the United States and suitable for the conversion into naval or military auxiliaries." [R. 17-18.] In other words, these vessels were constructed as merchant vessels, but of such size, etc., "suitable for the conversion into

naval or military auxiliaries." This is in accordance with the general policy of the Maritime Commission, as established in the Merchant Marine Act, 1936, and set forth in Sections 1101 and 1120 of 46 U. S. C. A., *supra.* These provisions were applicable to all ships constructed by the Maritime Commission and in no way indicate an intention to actually use the vessels as naval or military auxiliaries. In this case there is no showing of any intention that the ships in question would be so converted, nor any evidence that they were in fact so converted. The Stipulation of Facts states that the shipments comprised materials for use in construction of vessels (Liberty Ships) built by the California Shipbuilding Corporation for the United States Maritime Commission. [R. 14.]

The reports to Congress prior to the passage of these acts indicated that the use of the ships constructed under these acts was to be primarily for carrying on commerce. The testimony of Admiral Land further indicated that this was the primary purpose of the construction of these ships.

The case of *St. Johns River Shipbuilding Co. v. Adams,* 164 F. (2d) 1012, *supra,* held that ships constructed under Public Law 247 of the 77th Congress were primarily for commerce and were to be placed in a different classification than tankers being constructed primarily for war purposes which was not commerce.

The opinion of the Comptroller General given August 15, 1941 stated that in his opinion, ships constructed under the Public Law No. 5 of the 77th Congress was

primarily for preserving and furthering the interest of the commerce of the United States.

For all these reasons, it must be concluded that as the materials being shipped in this action were to be used for vessels to be constructed primarily for commerce, these shipments were not military or naval property moving for military or naval and not for civil use within the meaning of Section 321(a) of the Transportation Act of 1940.

III.

The Trial Court Properly Held for Pacific Electric Railway Company as to Certain of the Shipments as Title Was Not in the United States at the Time of Shipment.

The exception in Section 321(a) applies to "property of the United States." In order to be "property of the United States" under this section, it is well settled that title to the property shipped must be in the United States at the time of shipment.

United States v. Galveston, Harrisburg & San Antonio Railway Company, 279 U. S. 401, 73 L. Ed. 760 (May 13, 1929);

Oregon-Washington Railroad & Navigation Company v. United States, 225 U. S. 339, 65 L. Ed. 667 (March 7, 1921);

Henry H. Cross Co. v. United States, 133 F. (2d) 183 (7th Cir.) (Feb. 3, 1934);

Illinois Central Railroad Company v. United States, 265 U. S. 208, 68 L. Ed. 983 (May 26, 1924);

Louisville & Nashville Railroad Company v. United States, 267 U. S. 395, 69 L. Ed. 678 (March 2, 1925).

The particular shipments as to which title was not in the United States at the time of shipment are the following:

Carrier's Bill Number	Bill of Lading Number	Purchase Contract Number	Amount in Dispute
F-10503-12	MC-88579	MCc-(ESP)-1520	$ 321.02
F-10610-1	MC-22992	MCc-(ESP)-1145	201.89
F-10540-1	MC-28270	MCc-(ESP)-1837	420.02
	MC-34759	MCc-(ESP)-2690	200.73
		Total	$1,143.66

Contracts MCc-(ESP)-1520 and MCc-(ESP)-1145 each provided that "Title to all of the products covered by this order will remain in the Seller until delivery thereof has been made to the Buyer at the destination herein named."

Contracts MCc-(ESP)-1837 and MCc-(ESP)-2690 each provided "The goods covered herein are the property of the Seller until delivered to the Buyer at the Buyer's fabricating point herein specified and shall not be diverted or reconsigned without permission of the Seller."

It will be noted that in each of the above cases there was an express provision in the contract that title remain in the seller until delivery of the goods. This clearly shows that title was not in the Government during the time of shipment as to any of these shipments.

The Government, apparently, takes the position that in spite of these clear contract provisions, that title was in the Government during the time of shipment because shipment was to be on Government bill of lading. Where

there is no provision in the contract as to title, it has been held that where the contract provides for shipment on Government bill of lading, that is some indication that title would pass to the Government at the time of shipment.

> *Illinois Central Railroad Company v. United States*, 265 U. S. 208, 68 L. Ed. 983 (May 26, 1924);
> *Louisville & Nashville Railroad Company v. United States*, 267 U. S. 395, 69 L. Ed. 678 (March 2, 1925).

On the other hand, it has been held that the mere use of Government bills of lading does not show that title is in the United States. In the case of *Louisville & Nashville Railroad Company v. United States*, 267 U. S. 395 at 402, it is stated:

> "The conclusion that the coal furnished the Tonopah was to be delivered at the mine is not sustained by the facts found. Under the invitation to bid, proposal and acceptance, delivery was to be made alongside the vessel at Pensacola. The coal was transported on government bills of lading. The United States paid the freight, less land-grant deductions. The use of government bills of lading and the payment of reduced charges by the United States are not sufficient to sustain a finding that the coal was the property of the United States when hauled by appellant. There is nothing to indicate that title passed before delivery at the vessel."

See, also:

> *Henry H. Cross Co. v. United States*, 133 F. (2d) 183 at 186.

Therefore, as to the above mentioned shipments the Government can in no event claim the benefit of land-grant rates as the property shipped was not "property of the United States" within the meaning of Section 321(a).

Conclusion.

It is, therefore, submitted that the District Court erroneously found that the shipments involved in this action were military or naval property moving for military or naval and not for civil use, and should have granted plaintiff judgment for the full amount of $8,943.82.

It is further submitted that the District Court correctly found that as to shipments covered by bills of lading Nos. MC-88579, MC-22992, MC-28270 and MC-34759 title of the shipment was not in the United States at the time of shipment, and therefore, the United States was in no event entitled to land-grant rates as to these shipments.

Respectfully submitted,

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APPENDIX.

1. Section 321(a) and (b) of the Transportation Act of 1940.

2. United States v. Powell, 91 L. Ed. 868, 330 U. S. 238, 67 S. Ct. 742.

3. Northern Pacific Ry. Co. v. United States, 91 L. Ed. 876, 330 U. S. 248, 67 S. Ct. 747.

4. Opinion of Comptroller General reported in 21 Corp. Gen. Op. 137.

1. TRANSPORTATION ACT OF 1940.

"Sec. 321. (a) Notwithstanding any other provision of law, but subject to the provisions of sections 1(7) and 22 of the Interstate Commerce Act, as amended (49 U. S. C. A., §§1, 22), the full applicable commercial rates, fares, or charges shall be paid for transportation by any common carrier subject to such Act of any persons or property for the United States, or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use or to the transportation of members of the military or naval forces of the United States (or of property of such members) when such members are traveling on official duty; and the rate determined by the Interstate Commerce Commission as reasonable therefor shall be paid for the transportation by railroad of the United States mail: *Provided, however,* That any carrier by railroad and the United States may enter into contracts for the transportation of the United States mail for

less than such rate: *Provided further,* That section 3709, Revised Statutes (U. S. C., 1934 edition, title 41, sec. 5), (41 U. S. C. A., §5), shall not hereafter be construed as requiring advertising for bids in connection with the procurement of transportation services when the services required can be procured from any common carrier lawfully operating in the territory where such services are to be performed.

"(b) If any carrier by railroad furnishing such transportation, or any predecessor in interest, shall have received a grant of lands from the United States to aid in the construction of any part of the railroad operated by it, the provisions of law with respect to compensation for such transportation shall continue to apply to such transportation as though subsection (a) of this section had not been enacted until such carrier shall file with the Secretary of the Interior, in the form and manner prescribed by him, a release of any claim it may have against the United States to lands, interests in lands, compensation, or reimbursement on account of lands or interests in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted to such carrier or any such predecessor in interest under any grant to such carrier or such predecessor in interest as aforesaid. Such release must be filed within one year from the date of the enactment of this Act. Nothing in this section shall be construed as requiring any such carrier to reconvey to the United States lands which have been heretofore patented or certified to it, or to prevent the issuance of patents confirming the title to such lands as the Secretary of the Interior shall find have been here-

tofore sold by any such carrier to an innocent purchaser for value or as preventing the issuance of patents to lands listed or selected by such carrier, which listing or selection has heretofore been fully and finally approved by the Secretary of the Interior to the extent that the issuance of such patents may be authorized by law."

2. United States v. Powell, 91 L. Ed. 868, 330 U. S. 238, 67 S. Ct. 742, March 3, 1947.

These cases involve controversies between the United States and respondent carriers over the transportation charges for shipments of government property in 1941. In one case phosphate rock and superphosphate are involved; in the other, phosphate rock. In both the commodities were purchased by the United States, shipped on government bills of lading over the lines of respondents, and consigned to the British Ministry of War Transport. They were exported to Great Britain under the Lend-Lease Act of March 11, 1941, 55 Stat. 31, 22 U. S. C. Supp. I, §411 *et seq.*, for use as farm fertilizer under Britain's wartime program for intensified production of food. It is agreed that these shipments were "defense articles" as defined in §2 of that Act.[1]

Respondents billed the United States for transportation charges on these shipments at the commercial rate and were paid at that rate. The Seaboard is a land-grant railroad. The Atlantic Coast Line is not; but it entered into an equalization agreement with the United States in 1938 under which it agreed to accept land-grant rates for shipments which the United States could alternatively

[1]The term includes "Any agricultural, industrial or other commodity or article for defense."

move over a land-grant road.[2] The General Accounting Office excepted to these payments on the ground that land-grant rates were applicable. The amounts of the alleged overpayments were deducted from subsequent bills concededly due by the United States. Respondents thereupon instituted suits under the Tucker Act, 36 Stat. 1091, 1093, as amended, 28 U. S. C. §41(20), to recover the amounts withheld. The United States counterclaimed for the difference between the amounts due under the commercial rate and those due under the land-grant rate and asked that the difference be set off against the claims of respondents and that the complaints be dismissed. The District Courts gave judgment for respondents. The Circuit Court of Appeals affirmed. (152 F. (2d) 228, 230.) The cases are here on petitions for writs of certiorari which we granted because of the importance of determining the controlling principle for settlement of the many claims of this character against the Government.

For years the land-grant rate was fifty per cent of the commercial rate and was applicable to the transportation of property or troops of the United States. 43 Stat. 477, 486, 10 U. S. C. §1375; *United States v. Union Pacific R. Co.*, 249 U. S. 354, 355; *Southern Ry. Co. v. United States*, 322 U. S. 72, 73. A change was effected

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[2]The points from which the phosphate was moved by the Atlantic Coast Line are also stations on the Seaboard Line. Hence the United States is entitled to secure land-grant deductions from the Atlantic Coast Line if the Seaboard would have been subject to land-grant rates on those articles.

Since the land-grant rates were substantially lower than the commercial rates, roads which competed with the land-grant lines were unable to get the government business. For that reason they entered into equalization agreements. See *Southern R. Co. v. United States*, 322 U. S. 72, 88 L. ed. 1144, 1146, 1147, 64 S. Ct. 869.

by the Transportation Act of September 18, 1940, 54 Stat. 898, 954, 49 U. S. C. §65. See *Krug v. Santa Fe Pac. R. Co.,* 329 U. S. .... All carriers by railroad which released their land grant claims against the United States[3] were by that Act entitled to the full commercial rates for all shipments, except that those rates were inapplicable to the transportation of "military or naval property of the United States moving for military or naval and not for civil use or to the transportation of members of the military or naval forces of the United States (or of property of such members) when such members are traveling on official duty . . ." §321(a).[4] The Seaboard filed such a release. Accordingly, the question presented by these cases is whether the fertilizer was "military or naval property of the United States moving

[3]Section 321(b).

[4]This provision was eliminated from §321(a) by the Act of December 12, 1945, 59 Stat. 606, c. 573, 49 U. S. C. A. §65(a), 10A F. C. A., Title 49, §65(a). Section 2 of that Act made October 1, 1946, the effective date of the amendment but provided that "any travel or transportation specifically contracted for prior to such effective date shall be paid for at the rate, fare, or charge in effect at the time of entering into such contract of carriage or shipment."

Senator Wheeler, Chairman of the Senate Committee on Interstate Commerce, who had charge of the bill on the floor, made the following statement concerning pending controversies of the nature involved in the instant cases:

> "Now, Mr. President, I wish to repeat what I said a moment ago. It should be made perfectly clear that the passage of this bill resulting in the repeal of the land-grant rates will have no effect whatever upon the controversies as to the proper classification of this material, provided it has moved prior to the effective date of the act. These controversies, which were discussed extensively at the hearings, will have to be settled by the courts; and action on the present bill, if favorable, will have no effect whatever upon the question of whether materials that have moved prior to the repeal fall within or without the classification of military or naval property." 91 Cong. Rec. p. 9237.

for military or naval and not for civil use" within the meaning of §321(a) of the Transportation Act.

The legislative history of the Transportation Act of 1940 throws no light on the scope of the except clause.[5] But it is apparent from the face of the statute that there are important limitations on the type of property which must be carried at less than the applicable commercial rates. In the first place, it is not the transportation of "all" property of the United States that is excepted but only the transportation of "military or naval" property of the United States. In the second place, the excepted property must be "moving for military or naval and not for civil use." Thus the scope of the clause is restricted both by the nature of the property shipped and by the use to which it will be put at the end of the transportation.

The bulk and main stress of petitioner's argument are based on the Lend-Lease Act which was enacted about six months after the Transportation Act. It is pointed out that in the case of every shipment under the Lend-Lease Act there was a finding by the Executive that the

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[5]See H. Rep. No. 2016, 76th Cong., 3d Sess., p. 87; H. Rep. No. 2832, 76th Cong., 3d Sess., p. 93. Relief from land grant deductions was urged on the basis of the financial plight of the railroads and the substantial increase in government traffic which occurred in the 1930's. See Report of President's Committee of September 20, 1938, I hearings, House Committee on Interstate and Foreign Commerce, 76th Cong., 1st Sess., on H. R. 2531, pp. 261, 271-272; Public Aids to Transportation (1938), Vol. II, pp. 42-45. The section finally enacted appears to represent a compromise between a House Bill eliminating land-grant rates entirely (see H. Rep. No. 1217, 76th Cong., 1st Sess., p. 27) and a Senate Bill which by its silence left them unchanged. S. 2009, 76th Cong., 1st Sess.

shipment would promote our national defense,[6] that the Act was indeed a defense measure,[7] and that unless the administration of that Act is impeached, all lend-lease "defense articles" fall within the except clause and are entitled to land-grant rates.

Under conditions of modern warfare, foodstuffs lend-leased for civilian consumption, sustained the war production program and made possible the continued manufacture of munitions, arms, and other war supplies necessary to maintain the armed forces. For like reasons, fertilizers which made possible increased food production served the same end. In that sense all civilian supplies which maintained the health and vigor of citizens at home or abroad served military functions.

So for us the result would be clear if the standards of the Lend-Lease Act were to be read into the Transporta-

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[6]The authority was vested in the President who might, when he deemed it "in the interest of national defense," authorize the Secretary of War, the Secretary of the Navy, or the head of any other department or agency of the Government to lease, lend, etc., "any defense article." §3(a)(2).

[7]The Act was entitled "An Act to Promote the Defense of the United States"; and the interests of national defense were the standards governing its administration, as §3(a)(2), *supra,* note 6, makes plain. The same purpose is evident from the Committee Reports. H. Rep. No. 18, 77th Cong., 1st Sess., pp. 2, 11; S. Rep. No. 45, 77th Cong., 1st Sess., p. 2. And as President Roosevelt stated on September 11, 1941, in transmitting the Second Report under the Act, "We are not furnishing this aid as an act of charity or sympathy, but as a means of defending America. . . . The lend-lease program is no mere side issue to our program of arming for defense. It is an integral part, a keystone, in our great national effort to preserve our national security for generations to come, by crushing the disturbers of our peace." S. Doc. No. 112, 77th Cong., 1st Sess., p. VI.

tion Act. For the circumstance that the fertilizer was to be used by an ally rather than by this nation would not be controlling.

Our difficulty, however, arises when we are asked to transplant those standards into the Transportation Act. And that difficulty is not surmounted though the exception in §321(a) be construed, as it must be, *Northern Pacific R. Co. v. United States,* No. 400, decided this day, strictly in favor of the United States.

In the first place, the Transportation Act, which preceded the Lend-Lease Act by only six months, provided its own standards. They were different at least in terms from the standards of the Lend-Lease Act; and they were provided at a time when Congress was much concerned with the problems of national defense. In September, 1940, when the Transportation Act was passed, Congress and the nation were visibly aware of the possibilities of war. Appropriations for the army and navy were being increased and the scope of their operations widened,[8] alien registration was required,[9] training of civilians for military service was authorized,[10] development of stock piles of strategic and critical materials was encouraged[11] —to mention only a few of the measures being passed

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[8]See, for example, Act of June 11, 1940, 54 Stat. 265, 292, 297; Act of June 13, 1940, 54 Stat. 350, 377, c. 343, Act of June 14, 1940, 54 Stat. 394, c. 364, 34 U. S. C. A. §498-1, 11 F. C. A., Title 34, §498-1; Acts of June 15, 1940, 54 Stat. 396, c. 365, 22 U. S. C. A. §521, 5 F. C. A., Title 22, §521, 54 Stat. 400, c. 375, 34 U. S. C. A. §749c-1, 11 F. C. A., Title 34, §749c-1; Act of June 26, 1940, 54 Stat. 599, c. 430.

[9]Act of June 28, 1940, 54 Stat. 670, c. 439, 8 U. S. C. §451 *et seq.,* 2 F. C. A., Title 8, §§451 *et seq.*

[10]Act of September 16, 1940, 54 Stat. 885, c. 720, 50 U. S. C. App. §301 *et seq.,* 11 F. C. A., Title 50, Appx. 5, §1.

[11]Act of September 16, 1940, 54 Stat. 897, c. 721, 15 U. S. C. A. §606d, 4 F. C. A., Title 15, §606d.

in the interests of national defense. See 50 Yale L. J. 250. Moreover, the realities of total war were by then plain to all. Europe had fallen; militarism was rampant. Yet in spite of our acute awareness of the nature of total war, in spite of the many measures being enacted and the many steps being taken by the Congress and the Chief Executive to prepare our national defense §321(a) of the Transportation Act was couched in different terms. In other parts of that Act,[12] as in many other Congressional enactments passed during the period, the exigencies of national defense constituted the standard to govern administrative action. But the standard written into §321(a) did not reflect the necessities of national defense or the demands which total war makes on an economy. It used more conventional language—"military or naval" use as contrasted to "civil" use. That obviously is not conclusive on the problem of interpretation which these cases present. But in light of the environment in which §321(a) was written we are reluctant to conclude that Congress meant "all property of the United States transported for the national defense" when it used more restrictive language.

In the second place, the language of §321(a) emphasizes a distinction which would be largely obliterated if the requirements of national defense, accentuated by a total war being waged in other parts of the world, were read into it. Section 321(a) uses "military or naval" use in contrast to "civil" use. Yet if these fertilizer shipments are not for "civil" use, we would find it difficult to hold that like shipments by the Government to farmers in this

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[12]Thus §1 emphasized the policy in establishing a national transportation system adequate, *inter alia,* to meet the needs "of the national defense."

country during the course of the war were for "civil" use. For in total war food supplies of allies are pooled; and the importance of maintaining full agricultural production in this country if the war effort was to be successful, cannot be gainsaid. When the resources of a nation are mobilized for war, most of what it does is for a military end—whether it be rationing, or increased industrial or agricultural production, price control, or the host of other familiar activities. But in common parlance, such activities are civil, not military. It seems to us that Congress marked that distinction when it wrote §321(a). If that is not the distinction, then "for military or naval and not for civil use" would have to be read "for military or naval use or for civil use which serves the national defense." So to construe §321(a) would, it seems to us, largely or substantially wipe out the line which Congress drew and, in time of war, would blend "civil" and "military" when Congress undertook to separate them. Yet §321(a) was designed as permanent legislation, not as a temporary measure to meet the exigencies of war. It was to supply the standard by which rates for government shipments were to be determined at all times—in peace as well as in war. Only if the distinction between "military" and "civil" which common parlance marks is preserved, will the statute have a constant meaning whether shipments are made in days of peace, at times when there is hurried activity for defense, or during a state of war.

In the third place, the exception in §321(a) extends not only to the transportation of specified property for specified uses. It extends as well to "the transportation of members of the military or naval forces of the United States (or of property of such members) when such

members are traveling on official duty. . . ." That clause plainly does not include the multitude of civilians employed by the Government during the war and exclusively engaged in furthering the war effort, whether they be lend-lease officials or others.[13] Thus, the entire except clause contained in §321(a) will receive a more harmonious construction if the scope of "military or naval" is less broadly construed, so as to be more consonant with the restrictive sense in which it is obviously used in the personnel portion of the clause.

In sum, we hold that respondents in these cases were entitled to the full applicable commercial rate for the transportation of the fertilizer. In *Northern Pacific R. Co. v. United States, supra,* we develop more fully the breadth of the category of "military or naval property" of the United States "moving for military or naval . . . use." It is sufficient here to say that the fertilizer was being transported for a "civil" use within the meaning of §321(a), since it was destined for use by civilian agencies in agricultural projects and not for use by the armed services to satisfy any of their needs or wants or by any civilian agency which acted as their adjunct or otherwise serviced them in any of their activities.

Affirmed.

Mr. Justice Rutledge dissents.

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[13]The provision under land-grant legislation that "troops of the United States" should be transported at half rates was held not to include discharged soldiers, discharged military prisoners, rejected applicants for enlistment, applicants for enlistment provisionally accepted, retired enlisted men, or furloughed soldiers en route back to their stations. *United States v. Union P.*, 249 U. S. 354, 63 L. ed. 643, 39 S. Ct. 294, *supra.* The same result was reached in the case of engineer officers of the War Department who were assigned to duty in connection with the improvement of rivers and harbors. *Southern P. Co. v. United States,* 285 U. S. 240, 76 L. ed. 736, 52 S. Ct. 324.

3. NORTHERN PAC. RY. CO. v. UNITED STATES, 91 L. Ed. 876, 330 U. S. 248, 67 S. Ct. 747, March 3, 1947.

This is a companion case to No. 56, *United States v. Powell,* and No. 57, *United States v. Atlantic Coast Line R. Co.*, decided this day [330 U. S. 238, ante, 868, 67 S. Ct. 742]. This case, like those, involves the construction of the provision §321(a) of the Transportation Act of 1940 [September 18] 1940, 54 Stat. 898, 854, 954 c. 722, 49 U. S. C. A. §65 (a), 10A F. C. A. title 49, §65 (a) which entitles "military or naval property of the United States moving for military or naval and not for civil use" to land-grant rates. 43 Stat. 477, 486, 10 U. S. C. §1375. It qualified to receive the higher rates authorized by §321 (a) of the Transportation Act of 1940 by the timely filing of the required release of land-grant claims pursuant to §321 (b) of the Act.[1]

The shipments in controversy were made over petitioner's railroad on government bills of lading in 1941, 1942, and 1943. They were admittedly government property at the time of carriage. Petitioner submitted its bills to the Government at the published commercial tariff rates. The United States, claiming that under §321 (a) of the Transportation Act each shipment was entitled to move at land-grant rates, deducted the difference between the commercial rates and the land-grant rates. Petitioner thereupon brought this suit under the Tucker Act to

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[1]This release was followed by a settlement of the litigation before this Court in *United States v. Northern P. R. Co.*, 311 U. S. 317, 85 L. Ed. 210, 61 S. Ct. 264. See *United States v. Northern P. R. Co.* (D. C. Wash.), 41 F. Supp. 273; S. Doc. No. 48, 77th Cong., 1st Sess.

recover the deducted sums. The District Court entered judgment for the United States on the claims here involved. 64 F. Supp. 1. The Circuit Court of Appeals affirmed. 156 F. 2d 346. The case is here on certiorari.

The shipments involved five types of property:

Copper cable.—Copper cable was transported to Tacoma, Washington, for use in the installation of degaussing equipment (a defense against magnetic mines) on a cargo vessel being so built that it might readily be converted into a military or naval auxiliary. The work was done by a contractor under contract with the Maritime Commission. The degaussing specifications were furnished by the Navy which also furnished the equipment and bore the cost. The vessel was delivered in 1941 and was operated as directed by the Maritime Commission or the War Shipping Administration. Whether it operated as a cargo vessel or as a military or naval auxiliary does not appear.

Lumber for construction of munitions plant.—In 1942 the Twin Cities Ordnance Plant was being constructed in Minnesota by contractors under the supervision of the Army. The plant was government owned and Army sponsored. Army officers were procuring agents for the lumber used in the construction. Petitioner transported lumber for use in the construction. The plant was completed in 1943 and manufactured ammunition for the armed forces.

Lumber for construction of Marine Corps pontons.—Petitioner in 1943 carried fir lumber to a plant in Minnesota to be treated, kiln dried, milled, and manufactured by a contractor into parts of demountable floating bridges required to move military personnel and war vehicles

across water barriers. The construction was under a contract with the Marine Corps. The manufactured product was either shipped overseas in connection with military or naval operations or was used in connection with the training of combat engineers.

Bowling alleys for Dutch Harbor.—Petitioner moved bowling alley equipment to Seattle, Washington, for reshipment to the Naval Air Base, Dutch Harbor, Alaska. The Navy had entered into a contract for the construction of an air base at Dutch Harbor on public land reserved for Navy use. The purchase and installation of the bowling alleys were pursuant to that contract and were approved by the Navy officer who had supervision and control of the construction program. The recreational facilities, which included the bowling alleys, were planned for initial use by the civilian construction crew and then, when construction work was ended, by the Navy. But in fact they were used only be members of the armed forces.

Liquid paving asphalt for Cold Bay, Alaska, airport.—In 1942 petitioner moved liquid paving asphalt to Seattle, Washington, for reshipment to Alaska. The asphalt was for use in constructing runways at an airport at Cold Bay under a program of the Civil Aeronautics Authority approved by a joint cabinet board as being necessary for the national defense. Work was commenced by a civilian contractor and, after the shipment had moved, was taken over by the Army which thereafter had full control of the field.

In four of the above instances the property was consigned to an army or navy officer; in the fifth, the shipment of liquid paving asphalt, the Civil Aeronautics Authority was the consignee. And as we have said, the

property in each case was at the time of shipment property of the United States. The question remains whether within the meaning of §321 (a) it was "military or naval" property and, if so, whether it was "moving for military or naval" use.

There is a suggestion that since the shipment of asphalt was to a civilian agency, the Civil Aeronautics Authority, it was not "military or naval" property. The theory is that "military or naval" property means only property shipped by or under control of the army or navy.

We see no merit in that suggestion. Section 321 (a) makes no reference to specific agencies or departments of government. The fact that the War or Navy Department does the procurement might, of course, carry special weight or be decisive in close cases. But it is well known that procurement of military supplies or war material is often handled by agencies other than the War and Navy Departments. Procurement of cargo and transport vessels by the Maritime Commission is an outstanding example. See Merchant Marine Act of 1936, §902, 49 Stat. 2015-2016, as amended, 46 U. S. C. §1242. And shortly before the Transportation Act of 1940 was enacted, Congress by the Act of June 25, 1940, 54 Stat. 572, 573-574, authorized the Reconstruction Finance Corporation to create subsidiary corporations to purchase and produce equipment, supplies, and machinery for the manufacture of arms, ammunition, and implements of war. And later that Act was amended to enable those corporations to purchase or produce any supply or article necessary for the national defense or war effort. Act of June 10, 1941, 55 Stat. 248, 249. As we have held in *United States v. Powell, supra,* not every purchase which

furthers the national defense is for "military or naval" use within the meaning of §321 (a). But property may fall within that category though it is procured by departments other than War or Navy.

It is also suggested that the property covered by the exception in §321 (a) is confined to property for ultimate use directly by the armed forces. Under that view materials shipped for the construction of vessels for the Maritime Commission and used to service troops at home or abroad would not be "military or naval" property. We likewise reject that argument. Civilian agencies may service the armed forces or act as adjuncts to them. The Maritime Commission is a good example. An army and navy on foreign shores or in foreign waters cannot live and fight without a supply fleet in their support. The agency, whether civil or military, which performs that function is serving the armed forces. The property which it employs in that service is military or naval property, serving a military or naval function.

But petitioner contends that, even if that is true, the construction of vessels or other military equipment or supplies is in a different category. It argues that none of the articles shipped in the present case was military or naval, since they were not furnished to the armed forces for their use. They were supplied, so the argument runs, for manufacture and construction which are civilian pursuits and which were here in fact performed by civilian contractors. Only the completed product, not the component elements, was, in that view, for military or naval use.

Military or naval property may move for civil use, as where army or navy surplus supplies are shipped for sale to the public. But in general the use to which the

property is to be put is the controlling test of its military or naval character. Pencils as well as rifles may be military property. Indeed, the nature of modern war, its multifarious aspects, the requirements of the men and women who constitute the armed forces and their adjuncts, give military or naval property such a broad sweep as to include almost any type of property. More than articles actually used by military or naval personnel in combat are included. Military or naval use includes all property consumed by the armed forces or by their adjuncts, all property which they use to further their projects, all property which serves their many needs or wants in training or preparation for war, in combat, in maintaining them at home or abroad, in their occupation after victory is won. It is the relation of the shipment to the military or naval effort that is controlling under §321 (a). The property in question may have to be reconditioned, repaired, processed or treated in some other way before it serves their needs. But that does not detract from its status as military or naval property. *Southern Pacific Co. v. Defense Supplies Corp.*, 64 Fed. Supp. 605. Within the meaning of §321 (a) an intermediate manufacturing phase cannot be said to have an essential "civil" aspect, when the products or articles involved are destined to serve military or naval needs. It is the dominant purpose for which the manufacturing or processing activity is carried on that is controlling.

Measured by that test, there can be no doubt that the five types of property involved in the present litigation were "military or naval" property of the United States "moving for military or naval and not for civil use" within the meaning of §321 (a). The lumber for the pontons, the asphalt for the airfield, the lumber for the

ammunition plant were used in Army or Navy projects directly related to combat preparations or to actual combat. Copper cable for the cargo vessel, though farther removed from that category, was well within the definition of "military or naval" property. It, too, was a defensive weapon. Beyond that it was purchased by the Navy Department and consigned to one of its officers. It was supplied pursuant to Navy specifications; and the ship on which it was installed was being prepared for possible ultimate use by the Navy. The bowling alleys were also well within the statutory classification. The needs of the armed forces plainly include recreational facilities. The morale and physical condition of combat forces are as important to the successful prosecution of a war as their equipment. The fact that the bowling alleys were planned for initial use of civilianworkers makes no difference. It is the nature of the work being done, not the status of the person handling the materials, that is decisive. Supplies to maintain civilians repairing army or navy planes is a case in point. The dominant purpose of the project in this case was the same whether civilians or military or navy personnel did the actual work.

Petitioner contends that if Congress intended to include in "military or naval property" articles for use in the manufacture of implements of war, it would have said so. It seeks support for that position from other Congressional enactments under which such materials were excluded because not mentioned[2] or were included by spe-

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[2]The embargo against "arms or munitions of war" authorized by the Joint Resolution of March 14, 1912 (see 37 Stat. 1733), was held not to include machinery for the construction of a munitions plant. 32 Op. Atty. Gen. 132.

cific reference.[3] We can find, however, little support for petitioner's contention in that argument. Apart from the different wording of those acts and the different ends they served, there is one decisive and controlling circumstance. We have more in §321 (a) than a declaration that "military or naval" property is entitled to land-grant rates. Congress went further and drew the line between property moving for "military or naval" use and property moving for "civil" use. As we have said, the controlling test is the use to which the property is dedicated or devoted. The fact that Congress did not define what was a "military or naval" use as distinguished from a "civil" use is unimportant. The classification made by Congress under this Act, unlike that made under the acts on which petitioner relies, was all inclusive not partial. What is military or naval is contrasted to what is civil. The normal connotation of one serves to delimit or expand the other. It is in that context that "military or naval" must be construed.

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[3]Thus the Act of July 2, 1940, 54 Stat. 712, 714, Chap. 508, 50 U. S. C. A. App., §701, authorized the President to prohibit or curtail "the exportation of any military equipment or munitions, or component parts thereof, or machinery, tools, or material, or supplies necessary for the manufacture, servicing, or operations thereof . . ."

The Act of November 30, 1940, 54 Stat. 1220, Chap. 926, 50 U. S. C. A., §101, 11 F. A. C., Title 50, §101, amending the Anti-Sabotage Act, defined "national-defense material" as including "arms, armament, ammunition, livestock, stores of clothing, food, foodstuffs, fuel, supplies, munitions, and all other articles of whatever description and any part or ingredient thereof," which the United States intended to use in the national defense.

The Act of October 16, 1941, 55 Stat. 742, c. 445, 50 U. S. C. A. Appx. §721, 11 F. A. C., Title 50, Appx. 20, §1, authorized the President to requisition the following types of property for the defense of the United States: "military or naval equipment, supplies, or munitions, or component parts thereof, or machinery, tools, or materials necessary for the manufacture, servicing, or operation of such equipment, supplies, or munitions . . ."

Petitioner also cotends that §321 (a) is a remedial enactment which should be liberally construed so as to permit no exception which is not required. Cf. *Piedmont & N. Ry. Co. v. Interstate Commerce Commission,* 286 U. S. 299, 311-312. But it is a familiar rule that where there is any doubt as to the meaning of a statute which "operates as a grant of public property to an individual, or the relinquishment of a public interest," the doubt should be resolved in favor of the Government and against the private claimant. *Slidell v. Grandjean,* 111 U. S. 412, 437. See *Southern Ry. Co. v. United States,* 322 U. S. 72, 76. That rule has been applied in construing the reduced rate conditions of the land-grant legislation. *Southern Pacific Co. v. United States,* 307 U. S. 393, 401; *Southern Ry. Co. v. United States, supra.* That principle is applicable here where the Congress, by writing into §321 (a) an exception, retained for the United States an economic privilege of great value. The fact that the railroads, including petitioner, filed releases of their land-grant claims in order to obtain the benefits of §321 (a) is now relied upon as constituting full consideration for the rate concession. It is accordingly argued that the railroads made a contract with the United States which should be generously construed. Cf. *Russell v. Sebastian,* 233 U. S. 195, 205. The original land-grants resulted in a contract. *Burke v. Southern Pacific R. Co.,* 234 U. S. 669, 680. Yet, as we have seen, they were nonetheless public grants strictly construed against the grantee. The present Act, though passed in the interests of the railroads, was in essence merely a continuation of land-grant rates in a narrower category. Therefore, it, too, must be construed like any other public grant.

Affirmed.

4. TRANSPORTATION—LAND-GRANT DEDUCTIONS—MILITARY OR NAVAL PROPERTY OF THE UNITED STATES. (B-19374) 21 Comp. Gen. Op. 137.

"Comptroller General Warren to the Chairman, U. S. Maritime Commission, August 15, 1941:

"I have your letter of August 2, 1941, as follows:

"As you know the Commission is presently engaged in an extensive ship construction program for the construction of 312 emergency type cargo vessels under Public Law 5, 77th Congress, 1st Session, approved February 6, 1941, and the Lend Lease Act. Expansion of this program is probable.

"The emergency type vessels are being constructed pursuant to Public Law 5, whereby the Commission is authorized to provide 'as rapidly as possible cargo ships essential to the commerce and defense of the United States,' and pursuant to the Lend Lease Act and appropriations thereunder (Public Law 11 and Public Law 23, 77th Congress, 1st Session, approved March 11 and March 27, 1941, respectively) whereby the Commission is authorized to manufacture and procure cargo vessels defined as 'defense articles for the Government of any country whose defense the President deems vital to the defense of the United States.' In order to carry out this program with the speed expressed or inherent in the respective statutory authorizations, the vessels in question are of identical design and are under construction in emergency shipyards owned by the Government in various parts of the United States. Further in the interests of speed, efficiency, and economy the Commission has deemed it desirable to procure and provide, by contracting directly or through an agent, for the manufacture of the greater part of the mate-

rials and equipment for use in the construction of the emergency type vessels. Under this procedure as materials and equipment are needed by the various shipyards they are shipped to such yards under Government Bills of Lading. At the time of shipment such materials and equipment are property of the United States. The quantity of materials purchased directly by the shipbuilders or on an f.o.b. destination basis is relatively small.

"Obviously, large expenditures must be made by the Commission in payment of transportation charges and the probable extent of such expenditures must be determined as accurately as possible in order to provide for proper allocation of funds in the Commission's budget. Under present circumstances, however, it is extremely difficult to ascertain the extent of the funds necessary to allocate from time to time on account of such charges. Due to the withdrawal of ships from intercoastal trade and due to the fact that the urgent needs of the shipyards frequently require rail shipment even if water carriage were otherwise available, a reasonable anticipation of transportation charges is particularly difficult with respect to iron and steel, and their products, in view of the extreme differential prevailing between rail and water rates on such items. In this connection, the Commission, through its Director, Emergency Ship Construction Division, has been requested by the Office of Price Administration and Civilian Supply to authorize that agency to represent the Commission's views with regard to securing the agreement of the railroads to reduce their commercial rates on iron and steel, and their products, and also to consider negotiating a rate under Section 22 of the Interstate Commerce Act for shipments of Government

property not subject to land grant reduction. In view of the large quantity of freight moving under the emergency ship construction program, the Commission has indicated accord with the general aims mentioned above and is interested in an early determination of the problems involved. We have been advised by the Office of Price Administration and Civilians Supply, however, that while the Transportation Act of 1940 abolished land grant deductions with respect to Government property, the railroads have expressed unwillingness to reduce their commercial rates so long as there is any doubt as to the application to Maritime Commission property of the exception contained in Section 321, Part II, Title III, of the Transportation Act which leaves in effect land grant rates so far as concern the shipment of 'military or naval property of the United States.' The applicable portion of said section reads as follows:

" 'Sec. 321. (a) Notwithstanding any other provision of law, but subject to the provisions of sections 1(7) and 22 of the Interstate Commerce Act, as amended, the full applicable commercial rates, fares, or charges shall be paid for transportation by any common carrier subject to such Act of any persons or property for the United States, or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use or to the transportation of members of the military or naval forces of the United States (or of property of such members) when such members are traveling on official duty; * * *'

"The doubt in this case appears to be predicated upon the unquestioned fact that the vessels for which the

materials and equipment purchased by the Commission are to be used, are being constructed as part of the Govern ment's emergency National Defense Program.

"The work under the Commission's emergency cargo vessel program was commenced pursuant to authorization by the President with funds allocated or authorized under the emergency fund for the President contained in the Military Appropriation Act (Public No. 611, 76th Congress, approved June 13, 1940) which Act provides, in part, with respect to said fund, as follows:

" 'To enable the President, through the appropriate agencies of the Government, without reference to section 3709, Revised Statutes, to provide for emergencies affecting the national security and defense and for each and every purpose connected therewith, including all of the objects and purposes specified under any appropriation available or to be made available to the War Department for the fiscal years 1940 and 1941; and the furnishing of Government-owned facilities at privately owned plants; * * *'

"Funds allocated under said emergency fund were used in financing the construction of shipbuilding facilities essential to the construction of the vessels.

"Public Law 5, under which 200 of the 312 emergency cargo vessels are being constructed, appropriates sums which by the terms of the Act are, in addition to the foregoing, necessary under a program of $350,000,000 to provide for the facilities and the construction of the ships. In this connection the President, in a message to Congress on January 16, 1941, said:

" 'Because of the urgency of the situation, and after consultation with the Office of Production Management

with respect both to the necessity for immediate action and to the coordination of this ship construction with other phases of the national-defense program, I have already allocated to the Maritime Commission the sum of $500,000 from the emergency fund for the President contained in the Military Appropriation Act, 1941, and have authorized the Commission to enter into contracts for these purposes to the extent of $36,000,000 under the contractual authority contained in said appropriation.'

"Irrespective of the possible subsequent disposition of these vessels the materials and equipment destined for use in their construction are at no time in the custody or control of the military or naval establishments of the Government. Accordingly, it seems a determination that such materials and equipment are 'military or naval property' must be based upon the broader ground that but for the existence of emergencies affecting the security and defense of the United States the program would not have been launched.

"In general, the classification of the component materials and equipment for the 112 emergency type vessels being constructed under the Lend Lease Act, as 'military or naval property of the United States,' is governed by the same considerations prevailing with respect to the 200 vessels being constructed pursuant to Public Law 5.

"In view of the use of the words 'military or naval' in connection with the transportation of members of the military or naval forces of the United States in said Section 321 of the Transportation Act, 1940, the Commission inclines to the view that by parity of reasoning, 'military or naval property' should be confined to property in actual use or custody of the War or Navy Depart-

ments. However, since the vessels in question are being constructed solely because of the emergencies affecting the security and defense of the United States, and since the applicable legislation was designed to further the ends of national defense from the point of view of military and naval preparedness, the Commission believes that there exists sufficient doubt in the premises to ask for a determination of the question by your office.

"In view of the resultant appropriation saving in the event land grant rates are applicable to this freight, and the possibility of a favorable conclusion to the aforementioned negotiations pending between the Office of Price Administration and Civilian Supply and the rail carriers in the event land grant rates are not applicable, it is respectfully requested that we may receive your decision at an early date.

"It is understood from the foregoing that the question presented relates to the right of the United States to deduction for land grant from commercial transportation charges on shipments of iron and steel procured by the United States Maritime Commission for the construction of certain cargo vessels, 200 of which are to be constructed under authority of the joint resolution approved February 6, 1941, Public Law 5, 55 Stat. 5, making an appropriation to the Martime Commission for emergency cargo ship construction, and the remainder, 112 cargo vessels, under authorizations made pursuant to the Act to Promote the Defense of the United States, approved March 11, 1941, being Public Law 11, 55 Stat. 31.

"It is noted you state that the materials and equipment destined for use in the construction of these vessels are at no time in the custody or control of the military or

naval establishments of the Government and that the Maritime Commission is inclined to the view that the term 'military or naval property' as used in the Transportation Act of 1940, 54 Stat. 898, should be confined to property in the actual use or custody of the War or Navy Departments, but that doubt in the matter exists by reason of the unquestioned fact that the vessels concerned are being constructed solely because of emergencies affecting the security and defense of the United States and pursuant to legislation designed to further the ends of national defense from the point of view of military and naval preparedness.

"In connection with the considerations so advanced it will be observed that the provisions of the Transportation Act of 1940, prescribing exemption from the requirement for the payment otherwise of the full applicable commercial rates and charges for or on behalf of the United States, relate in terms to 'military or naval property *of the United States* moving for military or naval and not for civil use' (italics supplied). There is no specific limitation of such exemption to property in the custody or control of the War or Navy Departments; and if military or naval property belonging to the United States is transported for military or naval and not for civil use, it is not apparent why deductions for land-grant, if otherwise available, are not required to be made. That military purposes may be served by construction under the direction or control of departments other than the War and Navy Departments seems sufficiently manifest from the provisions of the Emergency Relief Appropriation Act, fiscal year 1941, 54 Stat. 611, making appropriation of $975,650,000 to the Work Projects Administration, and con-

taining a provision for the use, by the Commissioner of Work Projects, of not to exceed $25,000,000 of the sum so appropriated to supplement amounts authorized for other than labor costs in connection with projects certified by the Secretary of War and the Secretary of the Navy, respectively, as being important for military or naval purposes. See in this connection 20 Comp. Gen. 438. See, also, in this connection, Public Law 166, approved July 11, 1941, 55 Stat. 584, which amends section 1 of the Act of January 28, 1915, 38 Stat. 800, so as to provide that the Coast Guard, which operates usually under the Treasury Department in time of peace, 'shall be a military service and constitute a branch of the land and naval forces of the United States at all times.'

"Concerning the construction of the 200 vessels under the joint resolution of February 6, 1941, *supra,* it is noted that said act appropriated funds 'for the purpose of providing as rapidly as possible cargo ships essential to the commerce and defense of the United States,' said funds to be available for the construction of 'ocean-going cargo vessels' of such type as the Maritime Commission may determine to be useful in time of emergency 'for carrying on the commerce of the United States.' In the report of the Committee on Appropriations, House of Representatives, relative to this resolution (Report No. 10), it is stated at page 2:

"The necessity for the emergency construction of these cargo ships arises from the depletion of the reserve tonnage of American registry due to a number of causes and the facing of a problem of having sufficient cargo ships for the needs of American commerce. The committee was advised that every ship left in the reserve fleet

is up for sale or charter or will be disposed of soon. The demand for ships exceeds the supply.

"Similarly, the report of the Senate Committee on Appropriations (Senate Report No. 7) in connection with this resolution states:

"The immediate need for the emergency construction provided for in this joint resolution is due to a possible world shortage of cargo vessels, the depletion of our reserve fleet and the additional demands for American ships for use in the avenues of commerce that are still open to them, which demands exceed the supply.'

"As further indicating the expectation that these ships would be devoted primarily to purposes of commerce rather than of war, there have been noted the views expressed in the following excerpts from the hearings before the subcommittee of the Committee on Appropriations, House of Representatives, in connection with this legislation:

"Page 4:

"Admiral Land. This particular appropriation covers 200 ships.

"Mr. Johnson of West Virginia. What are you going to do with them?

"Admiral Land. We are going to operate them.

"Mr. Ludlow. Would they be held in reserve for any particular purpose, Admiral?

"Admiral Land. I would say they would be held in reserve for the transportation of American commerce. Where they would be operated it would be useless for me to attempt to predict, because these ships will not be available for some time. The first ship, we estimate, will be completed in 11 months after the date of the contract,

and the total program will be completed in 24 months after the date of the contract.

"Page 5:

"Mr. Cannon. What comparison is there in need and circumstances and purpose, as between these ships and the wooden ships built during the World War?

"Admiral Land. I do not think there is any proper basis of comparison between these and the wooden ships, because these are so far superior to the wooden ships, in carrying capacity and other ways.

"Mr. Cannon. Are they being asked for the same purpose?

"Mr. Land. I would say, generically they are, with this modification. The wooden ships and the concrete ships in the last war were built for what is generically known as the bridge of ships between here and Europe. There is no such purpose in this, as far as my knowledge does. There were some 2,300 vessels built for this bridge of ships, and here we are talking about 200 ships. There is no comparison.

"Mr. Cannon. They are not being requisitioned for the same purpose?

"Admiral Land. No; as far as my knowledge goes they are for American commence.'

"Page 11:

"Mr. Ludlow. Will they be used exclusively for American commerce, or will they be used in cooperation with Great Britain?

"Admiral Land. They would be more for the transportation of American commerce. As I have indicated,

there is a probable use for them in the intercoastal and domestic trade, in which they would be superior to what we have now. As to what may happen to them after that, I would not want to prophesy.

"With respect to the Act to Promote the Defense of the United States, approved March 11, 1941, 55 Stat. 31, and the Defense Aid Supplemental Appropriation Act, 1941, approved March 27, 1941, 55 Stat. 53, under which it is understood the remaining 112 vessels are being constructed, it is noted that under the former the Secretary of War, the Secretary of the Navy, or the head of any other department or agency of the Government, may be authorized by the President to Manufacture or procure, to the extent funds are made available therefor, and to sell, transfer title to, lease, lend, or otherwise dispose of any defense article to the government of any country whose defense the President deems vital to the defense of the United States. The term 'defense article' is defined in said act as meaning, among other things, 'Any weapon, munition, aircraft, vessel, or boat' and 'Any agricultural, industrial, or other commodity or article for defense.'

"In the report of the Committee on Foreign Affairs, House of Representatives, concerning this measure (Report No. 18), it is stated:

"It should be noted that the term 'defense article' includes not only all arms, munitions, and implements of war, but also other articles or commodities such as cotton, wheat, and all other agricultural products which may be necessary for defense purposes. * * *

"Likewise in the report of the Senate Committee on Foreign Relations relative to the matter (Senate Report

No. 45), the scope of the term 'defense article' is the subject of comment as follows:

"The term 'defense article' is defined so as to include the usual implements of war, such as guns, airplanes, and tanks, and also the food, clothing, medical supplies, and the like, without which warring nations could be helpless. * * *

"In connection with the Defense Aid Supplemental Appropriation Act, 1941 (Public Law 23), making an appropriation of $7,000,000,000 to enable the President to carry out the provisions of the above act, the report of the Committee on Appropriations, House of Representatives (Report No. 276), in explanation of the omission of minute details concerning the matters covered by the appropriation, states:

"* * * The procurements under the funds in this bill are for weapons and instruments of war to aid the countries which are engaged in a desperate struggle and whose success in that combat is vital to us. * * *

"However, the act provides in section 3 that—

"Any defense article procured from an appropriation made by this Act shall be retained by or transferred to and for the use of such department or agency of the United States as the President may determine, in lieu of being disposed of to a foreign government, whenever in the judgment of the President the defense of the United States will be best served thereby.

and it is assumed that if the 112 vessels to be constructed under these acts are not to be devoted to use by a foreign government, but instead are to be retained for use by the United States along with the 200 cargo ships to be con-

structed under the joint resolution of February 6, 1941, such action would be pursuant to this provision.

"Therefore, viewing your question in the light of the purposes to be served, so far as is discernible from the legislation under which it appears the vessels are to be constructed, it would seem reasonably clear that while the construction of the vessels for which provision is made in the joint resolution of February 6, 1941, may have resulted from, or may have been necessitated by, the demands arising under the national defense program, the primary purpose of said joint resolution was to provide said ships as a means of preserving or furthering the interests of the commerce of the United States and to augment the depleted facilities available for that purpose, replacing vessels withdrawn from said service because of the demands of defense. On the other hand, in the Act to Promote the Defense of the United States and in the Defense Aid Supplemental Appropriation Act, 1941, the emphasis seems to be placed principally upon the rendering of direct aid in resistance to military aggression, though it is conceivable, at least, that in some instances articles authorized to be manufactured or procured under said acts might be put, as a matter of defense, to a use not directly connected with military operations. Within the scope of these objectives, it is realized that there is possible a wide variation in the purpose to be served through the use of cargo vessels, ranging from the carrying of munitions and supplies for direct consumption by military forces in the theatre of war, on the one hand, to the transportation of cargoes for domestic consumption, related, as a matter of defense, to military operations only remotely, if at all, on the other. The question as to whether the materials to

be procured for the construction of the cargo vessels here concerned under either act are to be directed to the accomplishment of the one or the other of these purposes is a question of fact concerning which information, initially at least, would seem to be an exclusive possession of the administrative agencies involved. The administrative determination, therefore, that the transportation involved in any particular instance embraces materials moving for military or naval and not for civil use will be given appropriate consideration. Having regard, however, to the purpose or use apparently intended to be served by the legislation concerned, it is believed that with respect to the materials for the construction of the cargo vessels authorized under the joint resolution of February 6, 1941, this office would not be required to object to the payment of transportation charges without deduction for land-grant in the absence of an administrative determination that, under the particular facts that may be involved in any instance, said materials are being transported for military or naval and not for civil use. Likewise, with respect to the materials for the construction of cargo vessels pursuant to the authorizations in the Act to Promote the Defense of the United States and the Defense Aid Supplemental Appropriation Act, 1941, if it be administratively determined that said vessels are to serve the purposes of commerce—as a matter of defense—rather than to participate in the carrying of supplies for military purposes, and that, therefore, the transportation of materials for their construction is regarded as involving materials moving for civil rather than military or naval use, the administrative certification accordingly will be accepted by this office as *prima facie* correct.

"Your question is answered accordingly."